IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

TUESDAY, THE 17TH OCTOBER 2006 / 25TH ASWINA 1928

ST.Rev..No. 343 of 2004()

TA.349/1998 of STAT ADDL.BENCH, KOTTAYAM
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REVISION PETITIONER/RESPONDENT.REVENUE.

STATE OF KERALA, REP. BY DEPUTY
COMMISSIONER(LAW), COMMERCIAL TAXES,
ERNAKULAM.

BY G.P. SRI.GEORGEKUTTY MATHEW

RESPONDENTS: APPELLANT./ASSESSEE.

M/S.ATHULYA LIQUORS, ARRACK CONTRACTORS,
KANICHUKULANGARA.

BY ADV. SRI.A.KUMAR

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 17/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

C.N.RAMACHANDRAN NAIR & K.M.JOSEPH, JJ.

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S.T.R.V. No.343 of 2004

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Dated this the 17th day of October, 2006.

JUDGMENT

Ramachandran Nair, J.

The question raised in the revision filed by the State is whether the Tribunal was justified in reversing the order of the first appellate authority and refixing the sale price of arrack at Rs.255/- per litre for the purpose of fixing unaccounted first sales of arrack by the respondent-assessee. The respondent-assessee was licencee for sale of arrack in Cherthala range during the year 1991-92. Being a registered dealer under the KGST Act, respondent was liable to maintain proper books of accounts. The Intelligence Officer of the Department conducted inspection on 26.2.1992 and it was noticed that respondent was not maintaining any books of accounts in the place of business. When stock was verified, shortage of 70 litres of arrack was noticed. Further, respondent had not accounted purchase of any soda, soft drinks, Arishtam etc., which according to the Assessing Officer are indispensable in the line of business carried on by the respondent. Admittedly there was non-maintenance of books of accounts and respondent admitted the offence and remitted a compounding fee of Rs.1,500/-. Since the respondent admittedly did not maintain books of accounts, the Assessing Officer in the course of assessment verified the genuineness of the transactions as disclosed in the

returns. It was noticed that going by the accounted quantity purchased with the quantity of sale of arrack and the sale price returned, the sale price of arrack per litre comes to Rs.272.21. However, the Assessing Officer on examining the sale price accounted by similar dealers in the area found that the sale price of arrack during the year varies from Rs.120/- to Rs.146/- per litre. Moreover, he has compared respondent's sale price of arrack with the sale price of branded Indian made foreign liquor and found that fairly good brands were getting sold at the rate of Rs.135/- to Rs.347/- per litre. In fact, premium whisky costs only Rs.372/- per litre, whereas ordinary whisky during the year costs Rs.190/- per litre. Therefore, the Assessing Officer found that the accounting of higher price on sale of arrack much above the prevalent market price only prove unaccounted purchase of arrack and sale of the same made by the respondent which attracts tax at the point of first sale. Obviously dealing in spurious liquor is an offence and no licencee can be expected to account purchase of arrack other than through proper channels. It is conceded that during the relevant year the source of arrack in the State was mostly from Government companies. The Assessing Officer therefore adopted the average market price of arrack during the year i.e.Rs.146/- per litre and he determined the first sales of arrack on this basis. When the assessee filed appeal before the appellate authority, the appellate authority reconsidered the whole issue and though confirmed rejection of books of accounts and estimation of turnover, granted the benefit of higher rate prevalent in the market i.e. Rs.169/- per litre for the purpose of determining turnover on first sales. While the assessee filed second appeal, the Department appears to have accepted the first appellate

order. The Tribunal confirmed rejection of books of accounts and estimation of turnover, but refixed the sale value at Rs.255/- by taking into account the kist amount and substantially allowed the claim. Against this, the Department filed T.R.C. 126/1995 and this court found that the order of the Assessing Officer and the first appellate authority was wrongly interfered with by the Tribunal. However, this court remanded the case back to the Tribunal for reconsideration. It is observed by this court in para 5 of the said judgment regarding the order of the Tribunal that there is non-consideration of relevant materials such as price of arrack sold in other shops in the Taluk and also the price of foreign liquor during the relevant period while fixing the turnover. Inspite of specific direction by this court to the Tribunal to consider data relied on by the lower authorities, the Tribunal restored their earlier order by holding that kist has to be loaded to the prevailing market price for the purpose of determining respondent's sales price. It is against this order revision is filed by the State.

2. We have heard Government Pleader appearing for the petitioner and Mr.A.Kumar, appearing for the respondent-assessee. The respondent-assessee has no case that they were maintaining proper books of accounts. In fact even though Tribunal's order is in their favour, the Tribunal has also confirmed the rejection of books of accounts because after inspection was conducted by the Intelligence Wing of the Department, the respondent-assessee conceded non-maintenance of books of accounts and remitted compounding fee to avoid prosecution and penalty. Therefore, there is nothing to support the creditworthiness of whatever is the accounts maintained by the respondent and it was rightly rejected by the Assessing

Officer, confirmed in first appeal and second appeal. The only question to be considered is whether the Tribunal had any material to reject the orders of the two lower authorities and in adopting a different method for estimating the unaccounted first sales turnover of arrack. The only principle applied by the Tribunal in arriving at a possible sale price of arrack at Rs.255/- per litre is by loading kist amount to the market price of arrack sold by other dealers. However, strangely the Tribunal has not taken note of the fact that kist is paid by every licencee and therefore, prevailing market price applied by the Assessing Officer and first appellate authority is the price of those licencees who have also paid kist. In other words, prevailing market price takes in all costs including the kist amount and we find no justification for the Tribunal to add kist again in respondent's case to the prevalent market price of arrack for the purpose of determining a separate market price for the respondent. We find that the respondent has not even controverted the prevalent market price of arrack and several brands of Indian made foreign liquor adopted by the Assessing Officer and relied on by the first appellate authority. Even though counsel for respondent submitted that there can be difference in market price because the price will depend on whether the shops are in rural, semi-urban or urban areas, we notice from the orders of the Assessing Officer and the first appellate authority that the prevalent market price adopted is from the very same Taluk. In fact, it is only by taking into account this contention of the respondent-assessee that the first appellate authority granted the benefit of higher market price of Rs.169/- per litre for determining the unaccounted first sales of arrack by the respondent. Moreover, it is stated by the authorities below and it

is common knowledge that arrack is the liquor of the poor people and irrespective of the area where shops are located, the consumers are from same class of the society. Therefore, price in the market is almost uniform and business cannot survive for those who maintain substantially higher price for the same product. Therefore, retail price is market regulated and it is always arrived at by the licencees by taking their cost including kist. Therefore, we find the order of the Tribunal fixing the market price of arrack sold by the respondent at Rs.255/- per litre while highest market price of arrack prevalent in the Taluk during the year was Rs.165/-, is arbitrary and untenable.

3. We find there is a tendency among departmental officers and the Tribunal to assume that all liquor sold in the State are obtained through proper channels because if unaccounted purchase and sales are concluded, the same will make the licencee-dealer an offender under the Abkari Act. However, cases of detection of sale of spurious liquor and liquor tragedies are not infrequent in the State. We find in the Division Bench decision of this court in K.C.SUNIL KUMAR V. STATE OF KERALA (1994) 2 KTR 32 this court upheld the assessment of estimated unaccounted sales turnover of arrack determined based on quantity accounted and by adopting prevalent market value. The facts of this case are exactly similar to the above case decided by this court and the only difference is that in that case Tribunal confirmed estimation of first sale of liquor by adopting the market price at Rs.40/- per litre whereas in this case Tribunal though confirmed estimation in principle, but applied an artificially higher market price which is without any rational basis. A Full Bench of this court in MARY

ANTONY V. STATE OF KERALA (2000) 8 KTR 545 held that an adverse inference can be drawn if the assessee fails to explain the transactions with reference to books of accounts. We are of the view that in cases of this nature where the sale price accounted cannot be correlated to actual quantity accounted with reference to market price, the Department will be perfectly justified in adopting market price as a rational basis and estimate unaccounted quantity of liquor sold by the assessee. Even though the issue raised is on estimation of turnover which is apparently a factual issue, we are constrained to interfere with the order of the Tribunal because the Tribunal had no material to reject or even to doubt the correctness of the data gathered and relied on by the lower authorities in estimating the turnover. Inspite of specific guidelines issued by this court while remanding the case in the first round of revision, the Tribunal misdirected itself by adding kist to market price to estimate a separate market price for the respondent which in our view is a perverse finding as there can be no separate market prices for same product for different dealers. Therefore, we hold that order of the Tribunal even after remand by this court is arbitrary and unsustainable. We therefore allow the revision case by cancelling the order of the Tribunal and restoring the order of the first appellate authority.

C.N.RAMACHANDRAN NAIR
Judge

K.M.JOSEPH
Judge

pms

C.N.RAMACHANDRAN NAIR &
K.M.JOSEH, JJ.

T.R.C. No. of 200

JUDGMENT

Dated